IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

RFA No.201 of 1999

Date of Decision : 7th November, 2007

Shyama Nand Kalta …Appellant.

Versus:

State of H.P and others …Respondents.

Coram:

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr.Ramesh Sharma, Advocate.

For the respondents. Mr. Ashok Chaudhary,
Addl. Advocate General.

Sanjay Karol, J (Oral).

Present appeal arises out of judgment dated 27th July, 1999 passed by the Additional District Judge, Shimla, in Civil Suit No. 70-S/I of 95/91 titled as Shyama Nand Kalta vs. State of H.P. and others, dismissing the plaintiff's suit for a recovery of a sum of Rs.2,96,851/-.

It is the case of the plaintiff that in the year 1982 to 1985, in order to provide relief to the people affected due to natural calamities, the defendants decided to get certain work executed through Panchayats by employing local people. The

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

plaintiff, who was serving as Pardhan, Gram Panchayat Nagan (Kothkhai), District Shimla, H.P. was awarded execution of 14 works in his Panchayat. There was no written order issued but however the broad understanding was that the payment was to be made after carrying out the measurement on the basis of the H.P.Public Works Department schedule of rates. The plaintiff successfully carried out certain works and received full and final payment in accordance with the HPPWD approved rates except in relation to 4 works for which he was paid a sum of Rs. 1,40,000/- only. For recovery of his dues, plaintiff was forced to file CWP 262/88 before this Court and vide orders dated 22.7.1988 the same was disposed of and a Local Commissioner was directed to be appointed to visit the site and carry out the measurement in accordance with the rules. According to the plaintiff, measurement was not carried out on the date fixed by this Court and was finally carried out on 18.12.1989. Based on the assessment carried out by the said Local Commissioner, defendants issued demand notice for the recovery of Rs.29,452/- as excess payment having been made to the plaintiff. The said amount was sought to be recovered as arrears of land revenue. Aggrieved by the same, plaintiff again approached this Court and filed a writ petition No.358 of 1990 assailing the defendants action. Vide order dated 25.7.1990 the writ petition was dismissed with liberty to the petitioner to file a Civil Suit. The plaintiff got served upon the defendants,

a legal notice dated 9.3.1991 for the recovery of Rs.1,89,290/- principal amount together with Rs.94,945/- interest @ 10% per annum w.e.f. 1.1.1990 to 31.12.1990 being the balance amount due and payable by the defendants to the plaintiff. In the absence of any response the present suit for the recovery of the said amount alongwith interest accrued from time to time filed by the plaintiff.

Defendants No. 1 to 3 resisted the claim of the plaintiff on the ground that the work carried out by the plaintiff on behalf of the defendants was by way of drought relief measures and with an intention to have "Sharamdan" to minimize the expenditure. The Pradhans of the Panchayats, where the work was to be executed, were asked to carry out the work by involving local people and procuring local material, such as, wood free of cost. No payment for wood was to be made unless the same was actually purchased from the market against proper receipt.

Importantly in the written statement it is not disputed that the defendants got the works carried out from the plaintiff. In the written statement it is admitted that the works were to be calculated according to H.P.Schedule of rates. The defence taken, however, is that on the basis of assessment carried out by the Local Commissioner on 18.12.1989, it was so found that the plaintiff had been given advance and paid amounts in excess of what was actually due to him and the

excess amount of Rs.29,452/- was to be refunded to the Government.

The defendants filed its counter claim for the recovery of the said amount.

Based on the pleadings of the parties, the Court below framed the following issues:-

1. Whether the plaintiff has no cause of action, as alleged in preliminary objection No.1 and 2 of the written statement filed by defendants No.1 to 3? O.P.Defendants 1 to 8.

2. Whether the plaintiff is entitled to recover the suit amount or a portion thereof and if so to what extent? OPP.

3. In case issue No.1 is decided in the affirmative, whether the plaintiff is entitled to interest and if so at what rate and from whom? OPP.

4. Whether the suit is within limitation, as alleged? OPP.

5. Whether the work was not completed within time, if so what is its effect? O.P.Defendants 1 to 3.

6. Whether excess amount has been paid to the plaintiff, as alleged by defendants 1 to 3 in their written statement? OPD No. 1 to 3.

7. Relief.

In support of its case, plaintiff examined six witnesses and the defendants examined two witnesses.

The trial Court held the suit filed by he plaintiff within limitation and it was so held that the cause of action for filing the suit had accrued in favour of the plaintiff. With regard to plea of non completion of work within time, the Court held that

since there was no fixed time schedule, it could not be said that the work had not been completed within time.

With regard to the entitlements and respective claims of the parties, the Court held that the plaintiff had not been able to prove in evidence, the extent of material and the money which the plaintiff had spent towards the procurement of raw material. The claim of the defendant was rejected on the ground that the report submitted by the Local Commissioner (DW-1) was cryptic and not supported by any abstracts with regard to the actual measurement and the details of the calculation.

The defendant/State has not assailed the impugned judgement.

I have heard the learned counsel for the parties and seen the record.

It is an admitted case of the parties that keeping in view the natural calamities, the defendants 1 to 3 had sanctioned various works in favour of the defendant No.4, with a view to provide relief to the local people affected by drought and heavy rains over a period of time. It is also admitted case of the parties that the work allotted had been successfully carried out by the plaintiff. Importantly, there is no dispute with regard to the quality of workmanship or the works carried out by the plaintiff. It is also admitted case of the parties that for getting the work executed the defendants had to make

payment in accordance with the H.P.Public Works Department Schedule Rates. The only defence taken by the defendant is that the claim of the plaintiff is not supported by any proof.

With regard to the measurement and the actual work carried out, there are two sets of documents on record. Ext.PW-4/A to Ext.PW4/F are the plaintiff's documents showing the work carried out by him, assessed at Rs.3,29,290/-. Ext.DW-1/A and Ext.DW-1/B are the defendants documents according to which the plaintiff was entitled to a sum of Rs.1,04,844/- as against a sum of Rs.1,34,296/**-** paid to him**.** Ext.DW-1/A which is an abstract of release of payment and from both these documents it is not clear what are the actual measurements and the rates applied to arrive at its conclusion.

Shayama Nand (PW-1) has deposed that the work was got carried out on the asking of the defendants. Defendants No.2 and 3 had visited the site and had asked him to do the work. He was told that the expense actually incurred by them shall be sanctioned and disbursed which was evident from Ext.PW1/A. He has further stated that he spent a sum of Rs.3,30,000/- as against which he has received a sum of Rs.1,34,000/- (in cash + food grains). He deposed that he constructed double storeyed school building consisting of 8 rooms and 3 grounds and 2 bridges out of which one was with roof. Vide Ext.PW-1/B he requested the Deputy Commissioner to pay the amount spent by him. In terms of the High Court

orders he was asked vide Ext.PW1/C to be present at the time of inspection by the Local Commissioner on 3rd May, 1999. According to him he was present but however the measurement could not be carried out as the Local Commissioner did not come. Vide Ext.PW-1/D he was suddenly asked to pay a sum of Rs.29,452/-. He filed Civil Writ Petition No. 358 of 1990 which was decided in terms of order dated 25th July, 1990 (Ext.PW1/F). He served a legal notice dated 9th March, 1991 (Ext.PW-1/G) calling upon the defendants to pay the amount. Photographs of the work carried and were exhibited as Ext.P1 to P7.

Sh. Surat Ram (PW-2) deposed that no measurement took place in terms of Ext.PW1/C on 3rd May, 1989.

Sh. Madan Lal (PW-3) is not the relevant witness.

Sh. S.P.Kapoor (PW-4) is an expert and retired Superintending Engineer of the defendants. He has deposed with regard to his qualification and further deposed that the assessment was carried out on the basis of physical inspection and actual measurements at the spot. He has duly proved his report and contents thereof as Ext.PW-4/A to Ext.PW-4/K, which inter-alia includes the abstract of measurements, the rates and the sketch plan. He has deposed that the rates have been fixed as per HPPWD Schedule of 1985 and cost index. Nothing material has come out in his cross examination.

Sh. Daulat Ram (PW-5), member of the Panchayat fully supported the version of PW-1, furnished the details and deposed that he prepared the master-roll and maintained the account of expenditure incurred for the work.

Sh. Roop Singh (PW-6) corroborated the version of PW-5 about the construction carried out by the plaintiff.

Sh. Sudesh Kumar (DW-1) has deposed about the contents of the report Ext.DW-1/B and abstract of payments Ext.DW-1/A.

Sh. Amar Singh (DW-2) has admitted that while proving his report Ext.DW-1/B he has admitted that the details of the measurements are not attached with his report Ext.DW-1/B.

In my view, the plaintiff has been able to prove on record the exact construction carried out by him. Measurement of the work duly stands proved vide Ext.PW-4/A to Ext.PW-4/H. The expert has carried out the measurement and there is no challenge to the same. It is admitted case of the parties that the plaintiff is entitled to the rates at the HPPWD schedule rates. PW-4 has categorically deposed that the assessment has been carried out on the basis of said schedule. There is no cross examination to this fact. Even DW-2 has stated that the assessment is on the basis of the said schedule. Therefore, there is no dispute with regard to the actual amount assessed and proved by the plaintiff.

Through the version of PW-1 and PW-4, it is clear that works were carried out, measured and assessment made in accordance with HPPWD Schedule rates. The report of the expert records exact measurements of the work carried out by the plaintiff. During cross-examination this witness was not cross-examined with regard to the actual measurements taken by him at the site. The defendants documents do not indicate the measurements and also the rates applicable, therefore, these documents are not considered for deciding the quality of assessment of payment. Since the payments were made as per the schedule rates, therefore, proof with regard to the payments made by the plaintiff and expenses incurred was not required to be proved.

Actual principal amount claimed by the plaintiff is of Rs.1,89,290/- exclusive of interest. The suit amount of Rs.2,95,851/- (wrongly calculated and claimed Rs.2,96,851) includes the interest claimed on this account amounting to Rs.1,06,561/-. However, with regard to the payment received by the plaintiff, there is the different version on record. As per DW-1/B the total amount paid to the plaintiff is Rs.1,04,844/-. While examining himself, plaintiff has stated to have received a sum of Rs. 1,34,000/-, whereas in the plaint the amount received is Rs.1,40,000/-. The suit is for the recovery of remaining amount of Rs.1,89,290/- (Rs.3,29,290-Rs.1,40,000).

However, ld. Counsel for the plaintiff has fairly submitted that out of the assessed amount cost of wood had to

be excluded which comes to Rs.51,036.88 paise (Rs. 405.60+7,445.96+26,879.16+6,181.54+9,112.28+1,012.34 =Rs.51,036.88 say Rs.51,037.00). Therefore, this amount has to be deducted from the principal amount of Rs.1,89,290/- and the total principal amount comes to Rs.1,89,290 – Rs.51,037 = Rs.1,38,253/-. As such, plaintiff is entitled to Rs.1,38,253/- being the principal amount due and payable to him for the works carried out by him.

Ld. Counsel for the plaintiff also did not press his claim for interest prior to filing of the suit but vehemently pressed for the claim of interest pendentelite and future.

The present suit was filed in the year 1991 and was subsequently transferred to the competent Court having the pecuniary jurisdiction. I have perused the order sheet. There is no delay on the part of the plaintiff. I am of the view that keeping in view the totality of the circumstances, and in the facts and circumstances, interest of justice would be met if interest pendentelite is awarded to the plaintiff at the rate of 6% per annum and future interest from the date of decree till the date of payment @ 6% per annum is also awarded.

The appeal is accordingly allowed and the judgment and decree passed by the trial court is set aside and the suit of the plaintiff is decreed as aforesaid. Decree sheet be prepared accordingly.

7.11.2007 **(Sanjay Karol)**
TM. **Judge.**